

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Court File No. _____

SALLY NESS,

Plaintiff,

v.

CITY OF BLOOMINGTON; MICHAEL
O. FREEMAN, in his official capacity as
Hennepin County Attorney; TROY
MEYER, individually and in his official
capacity as a police officer, City of
Bloomington; MIKE ROEPKE,
individually and in his official capacity as a
police officer, City of Bloomington,

Defendants.

COMPLAINT

[Civil Rights Action under 42
U.S.C. § 1983]

JURY TRIAL DEMANDED

Plaintiff Sally Ness, by and through her undersigned counsel, brings this Complaint against the above-named Defendants, their employees, agents, and successors in office, and in support thereof alleges the following upon information and belief:

INTRODUCTION

1. This case seeks to protect and vindicate fundamental constitutional rights. It is a civil rights action brought under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, challenging the constitutionality of Minnesota Statute § 609.749 (“Harassment Statute”) and provisions of § 5.21 of the City of Bloomington Code (“No Filming Regulations”), facially and as applied to restrict Plaintiff’s filming activity, which is protected by the First Amendment.

JURISDICTION AND VENUE

2. This action arises under the Constitution and laws of the United States. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1343.

3. Plaintiff's claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

4. Plaintiff's claim for nominal damages is authorized under 42 U.S.C. § 1983 and by the general legal and equitable powers of this Court.

5. Plaintiff's claims for attorneys' fees and expenses are authorized by 42 U.S.C. § 1988 and other applicable law.

6. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this district.

PARTIES

7. Plaintiff Sally Ness is an adult citizen of the United States. She resides in the City of Bloomington, Minnesota. Her home is in the Smith Park neighborhood.

8. Defendant City of Bloomington (hereinafter "City") is a municipal entity organized and existing under the laws of the State of Minnesota. The City is a municipal corporation with the right to sue and be sued.

9. The City and its officials are responsible for creating, adopting, approving, ratifying, and enforcing the policies, practices, customs, and/or procedures of the City, including the challenged enforcement of the Harassment Statute and the enactment and enforcement of the No Filming Regulations as set forth in this Complaint.

10. The City, through its police officers, including Defendants Troy Meyer and Mike Roepke, enforces the challenged Harassment Statute and No Filming Regulations to restrict Plaintiff Ness's free speech rights as set forth in this Complaint.

11. The City's policies, practices, customs, and/or procedures were the moving force behind the constitutional violations set forth in this Complaint.

12. At all relevant times, the City trained, supervised, and employed its police officers, including Defendants Meyer and Roepke.

13. The City's deficient training and supervision of Defendants Meyer and Roepke were done with deliberate indifference as to their known or obvious consequences and were a moving force behind the actions that deprived Plaintiff Ness of her fundamental rights as set forth in this Complaint.

14. At all relevant times, Defendants Troy Meyer and Mike Roepke were police officers with the City Police Department.

15. At all relevant times, Defendants Meyer and Roepke were agents, servants, and/or employees of the City, acting under color of state law. Defendants Meyer and Roepke are sued individually and in their official capacities.

16. Defendant Michael O. Freeman is the Hennepin County ("County") Attorney. In that capacity, Defendant Freeman is responsible for investigating and prosecuting allegations of harassment under the Harassment Statute as set forth in this Complaint.

17. At all relevant times, Defendant Freeman was an agent, servant, and/or employee of the County, acting under color of state law. Defendant Freeman is sued in his official capacity only.

STATEMENT OF FACTS

Harassment Statute and No Filming Regulations

18. The Harassment Statute states, in relevant part, as follows:

609.749 HARASSMENT; STALKING; PENALTIES.

Subdivision 1. **Definition.** As used in this section, “harass” means to engage in intentional conduct which: (1) the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated; and (2) causes this reaction on the part of the victim.

Subd. 1a. **No proof of specific intent required.** In a prosecution under this section, *the state is not required to prove that the actor intended to cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated*, or except as otherwise provided in subdivision 3, paragraph (a), clause (4), or paragraph (b), that the actor intended to cause any other result.

Subd. 2. **Harassment and stalking crimes.** (a) A person who harasses another by committing any of the following acts is guilty of a gross misdemeanor:

* * *

(2) stalks, follows, monitors, or pursues another, whether in person *or through technological or other means*;

* * *

Subd. 3. **Aggravated violations.** (a) A person who commits any of the following acts is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both:

* * *

(5) commits any offense described in subdivision 2 against a victim under the age of 18, if the actor is more than 36 months older than the victim.

* * *

Subd. 5. **Pattern of harassing conduct.** (a) A person who engages in a pattern of harassing conduct with respect to a single victim or one or more members of a single household which the actor knows or has reason to know would cause the victim under the circumstances to feel terrorized or to fear bodily harm and which does cause this reaction on the part of the victim, is guilty of a felony and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both.

* * *

Subd. 7. **Exception.** Conduct is not a crime under this section if it is performed under terms of a valid license, to ensure compliance with a court order, or to carry out a specific lawful commercial purpose or employment duty, is authorized or required by a valid contract, or is authorized, required, or protected by state or federal law or the state or federal constitutions. Subdivision 2, clause (2), does not impair the right of any individual or group to engage in speech protected by the federal Constitution, the state Constitution, or federal or state law, including peaceful and lawful handbilling and picketing.

Minn. Stat. § 609.749 (emphasis added).

19. The No Filming Regulations state, in relevant part, as follows:

§ 5.21 REGULATIONS.

The rules and permits in this section are required to ensure the safety and general welfare of the public and the quiet and orderly use and enjoyment of the city's parks. The City Council may adopt fees and policies pursuant to this section in furtherance of these objectives. The following regulations shall apply to all city parks.

* * *

(11) Commercial use and photography.
No person shall:

* * *

(B) Operate a still, motion picture, video or other camera for commercial purposes in a park without a permit approved by the city.

* * *

(24) No person shall intentionally take a photograph or otherwise record a child without the consent of the child's parent or guardian.

* * *

§ 5.22 PENALTY.

Any person violating § 5.21 (9) or (13) shall be guilty of a misdemeanor, all other violations of this Article III shall be punishable as a petty misdemeanor.

A true and accurate copy of the regulations are attached to this Complaint as Exhibit A.

Dar al Farooq/Success Academy Public Controversy

20. In March 2011, Islamic Al Farooq Youth and Family Center (hereinafter "AFYFC," later called Dar al-Farooq, or "DAF") applied for a land use permit to renew the existing conditional use on a "quasi-public" site in a residential zone (R-1) located in the Smith Park neighborhood of the City.

21. The site was previously occupied by a Lutheran high school.

22. AFYFC's application described the intended use as similar to the prior religious education functions: a private elementary school, a day care, and a place of assembly/community center.

23. Testimony and applicant submissions revealed that AFYFC planned to schedule evening lectures, fitness programs, on-site medical clinic services, weekend school for children (like "Sunday School"), and one Friday prayer service. Ramadan observances were described as special evening prayers conducted between 9:00 p.m. and 10:00 p.m. nightly for the duration of the month-long observance.

24. Hyder Aziz, the spokesperson for AFYFC, emphatically stated that there were no major changes planned for the building "from what it used to be [in the past]." He

offered the community many assurances and addressed “Smith Park neighbors” to say that their interests would be included, an outreach committee would be established, and that the neighborhood would have access to the facilities, including a free weekend medical clinic (if approved by the planning commission).

25. Aziz further stated that leadership at the Center would “not tolerate any discomfort or inconvenience to [the Smith Park] neighbors,” and he assured the community that AFYFC would promote good relations with them. He also apologized to local residents for overflow parking when the first “once in a blue moon” hospitality event drew “unanticipated” numbers of attendees and vehicles (approximately 800 to 1,000 attendees).

26. The City did not raise any objections to this open house event during the application hearings.

27. Despite this timely evidence that DAF testimony had grossly underrepresented the level of activity that would immediately occur at the site, the City Council approved a Conditional Use Permit (“CUP”) that failed to protect the surrounding neighborhood against the intentional omissions and generalities that afforded loopholes in the final agreement.

28. Although the CUP did attempt to prevent on-street parking and deter conditions that would “be injurious to the surrounding neighborhood or otherwise harm the public health, safety and welfare” (an affirmative finding that must be met for conditional uses), the City quickly dispensed with even these limiting measures.

29. Immediately after the CUP was approved, a YouTube video advertised that the site would offer “a full-time and hourly licensed Islamic Day Care Center, an Islamic

Pre-School for Toddlers, an Islamic Weekend Academy, a Fitness Center for Muslim women, a state-of-the-art Multimedia Center, a Canteen, a full-time Islamic Elementary School, a Community Conference Room and a Prayer Room,” as well as “educational lectures in multiple languages,” and, “cultural, educational and athletic events and programs.”

30. Almost as important as the CUP to the affected community was the Joint Use Agreement (“JUA”), which would govern shared use of sport fields, courts, and parking for organized and general recreation.

31. A straightforward agreement was in use for the previous property owners, and the DAF CUP required an updated JUA by September 2011 (four months after the CUP issued) to reflect new usage patterns.

32. The updated JUA provided the City an opportunity to close loopholes and correct some of the offending uses of the property, which are detailed further below. However, the City allowed DAF to delay updating the JUA for three and a half years past the deadline, while imposing no penalties or replacement deadlines.

33. In the updated JUA, DAF secured many advantages, gaining generous priority use of public fields and facilities while also claiming spontaneous use opportunities. Recreational closing time was extended to 11:30 p.m. in a residential neighborhood. Other concerns include: DAF control of most summer football field weekend times that were exclusively reserved in the JUA contract for “minimal” City use and a lack of required annual meetings for coordination of field schedules in the interest of preserving public access. Most beneficial to DAF was the fact that the entire remedy

section was revised to suggest only serial warnings and mediations before considering any penalties.

34. During the first five years (2011 to 2016), neighbors were so concerned about large overflow events, traffic congestion and violations, noise (basketball sessions late into the night), regular on-street Friday parking, including semi-trucks and buses, meetings scheduled to conclude well after typical neighborhood “quiet time” of 10:00 p.m., continual usage of facilities, and overflowing trash that they presented a petition to the City in 2016 demanding answers. Plaintiff Ness was one of these concerned neighbors.

35. The City dismissed the petition on procedural grounds, claiming that it failed to meet a codified definition of a “petition” and had no signatures. The City entirely ignored the substance of the complaints despite the fact that the City Council meeting where the petition was presented was well attended by those who supported and shared the concerns expressed in the petition.

36. The litany of specific abuses permitted by the City include, *inter alia*, excusing a host of unapproved DAF activities, such as operating a university and a restaurant, hosting unpermitted regional events, and operating weekend schools over the permitted amount. Neighbors, including Plaintiff Ness, also noted privileged treatment by the City in the form of non-enforcement of the CUP and JUA by ignoring, *inter alia*, parking and traffic violations and the excessive use of DAF’s facilities and public facilities, including a neighborhood park.

37. Additionally, DAF did not formally act to open the private school described in the CUP. Instead, DAF began the process of opening a charter school (Success

Academy) in 2017. DAF began the process of opening the school without filling out an amendment to the CUP or officially informing the City. When the City learned of the student activity, it initially warned DAF that student count must be 60 per the CUP limits—that Fall DAF had over 80 students. The City ultimately approved a new CUP in August 2018 for 130 students.

38. A City park playground (Smith Park) was offered to DAF by vote of the City Council for use of its lessee, Success Academy, despite a staff report conclusion that DAF should provide its own playground equipment. The City has refused to address neighborhood concerns regarding the number of times per day or students per session that the Success Academy may appropriate this City park for its recesses, rendering the park essentially unavailable to the general public, including Plaintiff Ness and her grandchildren.

39. City staff reports do not provide an analog in the City for a school relying upon a City park playground for recesses. DAF and the Success Academy have used the playground more than six times per weekday and on weekends for other religious “schools.” However, at least two other institutions were required to rent the park and playground: Evergreen Church at Smith Park and Bloomington Middle School Valley View.

40. The use of the Smith Park by DAF and the Success Academy has severely limited, if not prohibited outright, the public’s use of this park.

41. The City has continually given DAF special treatment by permitting it to expand and invent permissions. This special treatment has not gone unnoticed. Indeed,

neighbors are aware that other religious institutions, including Resurrection Power Church and Father's House, have been denied conditional use permits or received strict post-permit inspections due to "expected" future growth and activity.

42. Plaintiff Ness has been the point person for delivering neighborhood concerns to City officials. She also maintains a public blog and Facebook page that documents many developments, observations, and concerns related to the DAF/Success Academy controversy in order to inform the public. Plaintiff Ness makes use of photographs and videos, often posted for public view on YouTube, as part of her efforts to disseminate this information to the public.

43. The City has demonstrated its animosity toward Plaintiff Ness's efforts to document and report the neighborhood concerns and the City's malfeasance related to these concerns.

44. For example, Plaintiff Ness would often speak during the public comment periods at City Council meetings regarding the DAF/Success Academy controversy. Councilmembers frequently challenged, interrupted, and admonished her for bringing forward the neighborhood concerns, discouraging her from further participation. City officials have also made derogatory comments about Plaintiff Ness.

45. The final straw was when the City Council required Plaintiff Ness to announce her home address over the public address system prior to her public comments rather than simply enter it on the speaker comment card pursuant to the council's standard practice. Plaintiff Ness refused to publicly announce her home address. She had reason to

fear retaliation from patrons at DAF/Success Academy. At one point, DAF/Success Academy patrons surrounded her car, trapping her, while they threatened and jeered her.

46. Plaintiff Ness no longer speaks at City Council meetings. Rather, she collects information regarding the DAF/Success Academy controversy, posts it on her blog/Facebook page for public dissemination, and provides it to others.

**Defendants' Threatened Enforcement of the
Harassment Statute to Silence Plaintiff Ness**

47. Plaintiff Ness collects information in a public forum via videotaping and photographing. More specifically, Plaintiff Ness collects information for public dissemination of possible CUP and JUA violations by DAF and the Success Academy by videotaping and filming from public forums, including public sidewalks, public parks, and while in her vehicle on a public street. On occasion, Plaintiff Ness would film, with permission, from her neighbors' driveways and from inside their homes. All of the activity filmed by Plaintiff Ness is in public view.

48. In August 2018, a formal complaint was made against Plaintiff Ness for possible violations of the Harassment Statute based on the fact that she was collecting information in a public forum via videotaping and photographing. Plaintiff Ness was collecting information for public dissemination of possible CUP and JUA violations by DAF and the Success Academy. In fact, she was filming traffic.

49. Defendant City did not pursue charges against Plaintiff Ness at that time.

50. On or about August 27, 2019, Plaintiff Ness was again collecting information in a public forum via videotaping. Plaintiff Ness was collecting information for public dissemination of possible CUP and JUA violations by DAF and the Success Academy.

51. Plaintiff Ness was approached by City police officers, including Defendants Meyer and Roepke. The officers told Plaintiff Ness that they were responding to a harassment complaint against her on account of her videotaping.

52. During this conversation, the City police officers warned Plaintiff Ness that if she continued with her videotaping and the complainants felt harassed or threatened by it, then Plaintiff Ness would be subject to arrest under the Harassment Statute regardless of Plaintiff Ness's intentions.

53. Pursuant to the official Bloomington Police Department report, Defendant Meyer "spoke with the (sic) Principal Rabeaa and parent Farrah and they stated the following: They both felt intimidated and scared that Ness was filming them and are worried that she may become violent towards them or their school. I spoke with Ness and advised how the Principal and parent felt and asked her to stop filming."

54. The police report concludes, "Ness was advised that she could be charged with harassment if the parents and principal felt intimidated by her actions"—actions which consisted only of videotaping and photographing public information for public dissemination.

55. Plaintiff Ness has never engaged in, nor threatened to engage in, any violent activity. Plaintiff Ness is a peaceful person, and the DAF and the Success Academy

complainants and the City police officers, including Defendants Meyer and Roepke, know that she has always acted peacefully. Moreover, the only acts that the complainants and the police officers object to are Plaintiff Ness's photographing and videotaping of public information related to the DAF/Success Academy controversy.

56. Accordingly, the Harassment Statute empowers DAF and Success Academy patrons (hecklers) to veto the exercise of Plaintiff Ness's First Amendment rights by claiming that they feel threatened by the exercise of those rights.

57. Because of this latest, credible threat by the City, through its police officers Defendants Meyer and Roepke, to enforce the Harassment Statute against Plaintiff Ness because she videotapes or photographs in a public forum information for public dissemination regarding the DAF/Success Academy controversy, Plaintiff Ness has ceased her filming activity.

58. Filming in a public forum information for public dissemination regarding the DAF/Success Academy controversy is fully protected by the First Amendment.

59. Plaintiff Ness reasonably fears that she will be arrested and/or charged with violating the Harassment Statute because of her videotaping and photographing activity.

60. On or about October 30, 2019, at the request of Detective Kristin Boomer from the City Police Department, Plaintiff Ness met with Detective Boomer, Detective Tracy Martin, and Community Liaison Officer Caitlin Gokey at Plaintiff Ness's home. Also present at this meeting was Larry Frost, an attorney who represents Plaintiff Ness.

61. Detective Boomer requested the meeting because, as she informed Plaintiff Ness at this meeting, Plaintiff Ness is a suspect in a harassment case as a result of her

filming activity related to her documenting the overuse and noncompliant use of Smith Park by DAF and the Success Academy.

62. Detective Boomer is investigating the matter on behalf of the County and for the “victims,” which she described as the “community center/mosque and school,” or words to that effect, referring to DAF and the Success Academy. More specifically, Detective Boomer is investigating the matter on behalf of Defendant Freeman, who, upon information and belief, is preparing to prosecute Plaintiff Ness for violating the Harassment Statute.

63. During this meeting, Detective Boomer confirmed that Plaintiff Ness was under investigation by the County (Defendant Freeman) for alleged violations of the Harassment Statute due to Plaintiff Ness’s information gathering efforts via videotaping and photographing of DAF and the Success Academy.

64. During this meeting, Detective Boomer confirmed that one of the concerns of the investigation is Plaintiff Ness’s photographing and/or videotaping of children associated with DAF and the Success Academy. This was one of the complaints from the “victims” of Plaintiff Ness’s alleged harassment.

65. During this meeting, Detective Boomer and Detective Martin suggested that Plaintiff Ness stop using Smith Park and that she should consider taking her grandchildren to another park.

66. The October 30th meeting with Detective Boomer confirmed Plaintiff Ness’s concerns and fears that she will be prosecuted under the Harassment Statute because she videotapes or photographs in a public forum information for public dissemination

regarding the DAF/Success Academy controversy. Consequently, Plaintiff Ness has ceased her filming activity.

The City's Approval of the No Filming Regulations to Silence Plaintiff Ness

67. On or about October 28, 2019, the City, through the City Council, approved revisions to the City Code to include the No Filming Regulations.

68. The City's motivation for approving the No Filming Regulations was to silence Plaintiff Ness by prohibiting her from videotaping and photographing the activities of DAF and the Success Academy.

69. The City approved the No Filming Regulations because it wanted to appease members of DAF and the Success Academy, who seek to silence Plaintiff Ness's speech and halt her information gathering efforts.

70. Because Plaintiff Ness seeks to expose, *inter alia*, DAF's and the Success Academy's noncompliant and overuse of Smith Park, Plaintiff Ness's information gathering efforts often include, quite necessarily, photographing and videotaping the use of Smith Park by children associated with DAF and the Success Academy.

71. Additionally, Plaintiff Ness has taken pictures of students being dropped off to Success Academy and weekend school to document the noncompliant number of students attending the schools, the unsafe and noncompliant drop off conditions, and the number of students who are tardy.

72. The enactment of the No Filming Regulations chills, and in fact, prevents Plaintiff Ness from videotaping or photographing in a public forum information for public dissemination regarding the DAF/Success Academy controversy.

73. Because of the No Filming Regulations, Plaintiff Ness has ceased her filming activities protected by the First Amendment because she does not want to be penalized under the new City regulations.

FIRST CLAIM FOR RELIEF

(Freedom of Speech—First Amendment)

74. Plaintiff Ness hereby incorporates by reference all stated paragraphs.

75. By reason of the aforementioned acts, policies, practices, procedures, and/or customs, created, adopted, and enforced under color of state law, Defendants have deprived Plaintiff Ness of her right to freedom of speech in violation of the First Amendment as applied to the states and their political subdivisions under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

76. Defendants' actions, as set forth in this Complaint, injured Plaintiff Ness in a way likely to chill a person of ordinary firmness from further participation in her free speech activity. Plaintiff's constitutionally protected activity motivated Defendants' adverse actions. Thus, Defendants acted with a retaliatory intent or motive.

77. The right to freedom of speech includes not only the actual expression of one's political views, thoughts, opinions, and other information concerning matters of public interest, but also non-expressive conduct that intrinsically facilitates one's ability to exercise free speech rights, including efforts to gather evidence and information by photographing and videotaping, as in this case.

78. The First Amendment protects Plaintiff Ness's right to film matters of public interest, including the public DAF/Success Academy controversy. Photographing and videotaping are legitimate means of gathering information for public dissemination.

79. The Harassment Statute, facially and as applied to Plaintiff Ness's expressive activity as set forth in this Complaint, violates the First Amendment.

80. The Harassment Statute, facially and as applied to Plaintiff Ness's expressive activity as set forth in this Complaint, operates as a heckler's veto in violation of the First Amendment.

81. The Harassment Statute, facially and as applied to Plaintiff Ness's expressive activity as set forth in this Complaint, is vague and overbroad in violation of the First Amendment.

82. Defendants will seek to enforce the Harassment Statute against Plaintiff Ness's expressive activity in the future.

83. The No Filming Regulations, facially and as applied to Plaintiff Ness's expressive activity as set forth in this Complaint, violate the First Amendment.

84. The No Filming Regulations, facially and as applied to Plaintiff Ness's expressive activity as set forth in this Complaint, operate as a heckler's veto in violation of the First Amendment.

85. The No Filming Regulations, facially and as applied to Plaintiff Ness's expressive activity as set forth in this Complaint, are vague and overbroad in violation of the First Amendment.

86. Defendants City, Meyer, and Roepke will seek to enforce the No Filming Regulations against Plaintiff Ness's expressive activity in the future.

87. The City's policies and practices with regard to the enforcement of the Harassment Statute were each a moving force behind the violation of Plaintiff Ness's rights protected by the First Amendment as set forth in this Complaint.

88. The City's enactment of the No Filming Regulations was a moving force behind the violation of Plaintiff Ness's rights protected by the First Amendment as set forth in this Complaint.

89. Defendant Freeman's enforcement of the Harassment Statute on behalf of the County was a moving force behind the violation of Plaintiff Ness's rights protected by the First Amendment as set forth in this Complaint.

90. As a direct and proximate result of Defendants' violation of the First Amendment, as set forth in this Complaint, Plaintiff Ness has suffered irreparable harm, including the loss of her fundamental constitutional rights, entitling her to declaratory and injunctive relief and nominal damages.

SECOND CLAIM FOR RELIEF

(Due Process—Fourteenth Amendment)

91. Plaintiff Ness hereby incorporates by reference all stated paragraphs.

92. By reason of the aforementioned acts, policies, practices, procedures, and/or customs, created, adopted, and enforced under color of state law, including the enforcement of the Harassment Statute (Defendants City and Freeman) and the creation and enforcement of the No Filming Regulations (Defendant City), Defendants City and

Freeman have deprived Plaintiff Ness of the right to due process of the law guaranteed under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

93. The Harassment Statute, facially and as applied to Plaintiff Ness's expressive activity as set forth in this Complaint, is vague in violation of the Fourteenth Amendment.

94. The No Filming Regulations, facially and as applied to Plaintiff Ness's expressive activity as set forth in this Complaint, are vague in violation of the Fourteenth Amendment.

95. The Harassment Statute is vague in that it traps the innocent by not providing fair warning.

96. The No Filming Regulations are vague in that they trap the innocent by not providing fair warning.

97. The Harassment Statute lacks explicit standards thereby permitting arbitrary and discriminatory enforcement and thus impermissibly delegating basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

98. The No Filming Regulations lack explicit standards thereby permitting arbitrary and discriminatory enforcement and thus impermissibly delegating basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

99. The Harassment Statute abuts upon sensitive areas of basic First Amendment freedoms and thereby operates to inhibit the exercise of those freedoms.

100. The No Filming Regulations abut upon sensitive areas of basic First Amendment freedoms and thereby operate to inhibit the exercise of those freedoms.

101. The vagueness and overbreadth of the Harassment Statute lead citizens such as Plaintiff Ness to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

102. The vagueness and overbreadth of the No Filming Regulations lead citizens such as Plaintiff Ness to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

103. The City's policy of enforcement of the Harassment Statute was the moving force behind the violation of Plaintiff Ness's rights protected by the Fourteenth Amendment as set forth in this Complaint.

104. The City's creation and enforcement of the No Filming Regulations were the moving force behind the violation of Plaintiff Ness's rights protected by the Fourteenth Amendment as set forth in this Complaint.

105. As a direct and proximate result of Defendants City's and Freeman's violation of the Due Process Clause, Plaintiff Ness has suffered irreparable harm, including the loss of her fundamental constitutional rights, entitling her to declaratory and injunctive relief and nominal damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff asks this Court:

- A) to declare that Defendants violated Plaintiff's constitutional rights as set forth in this Complaint;
- B) to declare the Harassment Statute invalid, facially and as applied to restrict Plaintiff's activity as set forth in this Complaint;
- C) to declare the No Filming Regulations invalid, facially and as applied to restrict Plaintiff's activity as set forth in this Complaint;
- D) to enjoin the enforcement of the Harassment Statute as set forth in this Complaint;
- E) to enjoin the enforcement of the No Filming Regulations as set forth in this Complaint;
- F) to award Plaintiff nominal damages;
- G) to award Plaintiff her reasonable attorney's fees, costs, and expenses pursuant to 42 U.S.C. § 1988 and other applicable law;
- H) to grant such other and further relief as this Court should find just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff hereby demands a trial by jury of all issues triable of right by a jury.

Respectfully submitted,

Dated: November 12, 2019

MOHRMAN, KAARDAL & ERICKSON, P.A.

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Attorneys for Plaintiff

ORDINANCE NO. 2019-37

AN ORDINANCE AMENDING CHAPTER 5 REVISING DEFINITIONS AND REGULATIONS RELATING TO CITY PARKS.

The City Council of the City of Bloomington hereby ordains:

Section 1. The City of Bloomington is entrusted by the public with the responsibility of managing public lands, parks, infrastructure, and property located in the city for the use and enjoyment of all persons. The city parks, green spaces, beaches, waters, trails, parking lots, and other public facilities offer opportunities for a broad range of public uses. In order to further the safety, health, enjoyment and welfare of all persons in the use of these public resources, the city adopts the following amendments to Chapter 5 of the City Code as it relates to parks and playgrounds.

Section 2. That Chapter 5 of the City Code is hereby amended by deleting those words that are in strikethrough font contained in brackets [] and adding those words that are underlined, to read as follows:

CHAPTER 5: PUBLIC FACILITIES AND PROPERTY

ARTICLE III: PARKS AND PLAYGROUNDS

§ 5.20 DEFINITIONS. The following word or term when used in this Article III, shall have the following meanings. [~~unless the context clearly indicates otherwise.~~]

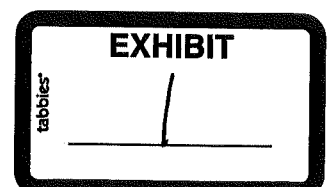
AUTHORIZED BEACHES. Designated areas with posted signs where swimming is allowed.

DIRECTOR. Parks and recreation department director or designee to whom specific duties have been assigned by the city manager.

CHILD. An individual under the age of 18.

ELECTRONIC DELIVERY DEVICE. Any product containing or delivering nicotine, lobelia or any other substance intended for human consumption through the inhalation of aerosol or vapor from the product. **ELECTRONIC DELIVERY DEVICE** includes, but is not limited to, devices manufactured, marketed, or sold as e-cigarettes, e-cigars, e-pipes, vape pens, mods, tank systems, or under any other product name or descriptor. **ELECTRONIC DELIVERY DEVICE(S)** also includes any component part of a product whether or not sold separately. **ELECTRONIC DELIVERY DEVICE** does not include any product that has been approved or certified by the United States Food and Drug Administration for sale as a tobacco-cessation product, as a tobacco-dependence product, or for other medical purposes, and is marketed and sold for such an approved purpose.

NICOTINE DELIVERY PRODUCT. Any product containing or delivering nicotine or lobelia intended for human consumption, or any part of such a product, that is not tobacco or an electronic delivery device as defined by this section. **NICOTINE DELIVERY PRODUCT** excludes any product that has been approved by the United



States Food and Drug Administration for sale as a tobacco use cessation product or for medical purposes, and is being marketed and sold solely for such an approved purpose.

MOTOR VEHICLE. Any self-propelled vehicle or vehicle propelled or drawn by a self-propelled vehicle which is operated on a highway, on the ground, or in the air.

PARKS. A park, conservation area, playground, beach, recreation center or other area in the city owned, leased or used, wholly or in part, by the city for such purposes or which is designated by the City Council as a park.

TOBACCO. Any product containing, made or derived from tobacco that is intended for human consumption, whether chewed, smoked, absorbed, dissolved, inhaled, snorted, sniffed or ingested by any other means, or any component, part or accessory of a tobacco product, including, but not limited to cigarettes, cigars, cheroots, stogies, perique, granulated, plug cut, crimp cut, ready, rubbed and other smoking tobacco; snuff, snuff flower, cavendish, plug and twist tobacco; fine cut and other chewing tobaccos; shorts, refuse scripts, clippings, cuttings and sweepings of tobacco; and other kinds and forms of tobacco.

TOBACCO-RELATED DEVICE. Cigarette papers or pipes for smoking, or any other device intentionally designed or intended to be used with tobacco. **TOBACCO-RELATED DEVICE** includes components of tobacco-related devices which may be marketed or sold separately.

TOBACCO-RELATED PRODUCT. Any tobacco, tobacco-related device, electronic delivery device, or nicotine delivery product, as those terms are defined in this section.

TOBACCO USE. Smoking, chewing, snuffing or otherwise inhaling or ingesting tobacco.

§ 5.21 REGULATIONS.

The rules and permits in this section are required to ensure the safety and general welfare of the public and the quiet and orderly use and enjoyment of the city's parks. The City Council may adopt fees and policies pursuant to this section in furtherance of these objectives. The following regulations shall apply to all city parks.

(1) No person shall drive or operate a motor vehicle in any park except on roads or designated parking areas or such other areas as the [Manager] Director of Parks and Recreation shall designate, and no person shall operate a motor vehicle within a park at a speed in excess of 15 mph.

(2) Parking.

(A) No person shall park any motor vehicle in any place in public parks between the hours of 10:00 p.m. and one hour before sunrise without a permit approved by the Director. During the hours when parking is permitted, said vehicles must be parked only in designated parking areas. Any unoccupied vehicle found in violation of park regulations may be removed and impounded by any police officer or duly authorized person in accordance with Chapter 8, Article III, Division B, of this code.

(B) No person shall park within the designated portions of the Hyland-Bush-Anderson Lakes Regional Park System without displaying a valid seasonal or daily parking permit issued by the city. ~~[or Three Rivers Park District.]~~

(3) No fires shall be lighted or made in any park except in places provided for such purposes, and except for fires lighted by city employees engaged in ~~[cleaning]~~ clearing the area.

(4) No person shall discharge any fireworks or firearms in any park without the ~~written permission of a permit from the~~ [Manager] Director of Parks and Recreation and ~~[without a permit]~~ in the case of fireworks, from the Fire Marshal and, in the case of firearms, from the Chief of Police.

(5) No person shall scatter about or litter the grounds with any form of waste material. No person shall carry upon park property any glass bottles or glass containers.

(6) No person shall commit any nuisance or any offense against decency or public morals in a public park.

(7) Beaches and public waters.

(A) No person shall throw refuse of any kind in any lake, pond or watercourse.

(B) The ~~[Manager]~~ Director of Parks and Recreation shall designate authorized beaches. ~~[AUTHORIZED BEACHES are those designated areas which shall be posted by appropriate signs and markers.]~~ Swimming is allowed only at ~~[designated]~~ authorized beaches.

(C) No person shall frequent any park waters or beach for the purpose of swimming or congregating with others or to swim or congregate thereat between the hours of 10:00 p.m. and 6:00 a.m. of the following day unless with the written permission of the ~~[Manager]~~ Director of Parks and Recreation.

(D) No person or persons shall have air mattresses, inner tubes or other inflated articles or flotation equipment on any park property unless such flotation devices shall have a Minnesota state watercraft license.

(E) No person shall use a tobacco-related product at any of the city's designated beach areas, or other designated pool and play areas at city-owned swimming pools and aquatic facilities. These areas shall be posted by appropriate signs and markers as ~~[directed]~~ designated by the ~~[Manager]~~ Director of Parks and Recreation.

(8) No person shall paste or affix or inscribe any handbill or poster on any structure or property in any of such parks or any place or square or highway surrounding the same.

(9) No person shall possess, display, consume or use intoxicating liquors in any park. No person shall possess, display, consume or use 3.2% malt liquors in any park except that 3.2% malt liquor may be consumed in designated picnic areas or when a valid, special event license has been issued under § 13.02.01(o) of this code.

(10) No person shall disturb or interfere with any birds or animals kept or found in any park.

~~{(11) No person shall sell any article whatever in any park unless he or she shall have a permit, lease or concession granted by the city.}~~

(11) Commercial use and photography.

No person shall:

(A) Solicit, sell or otherwise peddle any goods, wares, merchandise, services, liquids or edibles in a park, except by permit approved by the city.

(B) Operate a still, motion picture, video or other camera for commercial purposes in a park without a permit approved by the city.

~~{(12) No person shall play any game of baseball or football or other game in any park except in areas provided therefor.}~~

~~{(13)}~~ (12) Dogs are allowed in city parks and on other city-owned property while restrained by a leash as described in § 14.87 of this code, except that dogs may be allowed unleashed within the boundaries of city parks or other city-owned property designated and posted by the [Manager] Director of Parks and Recreation as an off-leash site.

~~{(14)}~~ (13) All parks shall close at 10:00 p.m., and no person shall remain in any park after that time, unless written permission shall have been given by the [Manager] Director of Parks and Recreation for parties to remain longer therein.

~~{(15)}~~ (14) No person shall write upon or mark or deface in any manner or use in any improper way any property or thing pertaining to or in said parks.

~~{(16)}~~ (15) All persons shall obey all reasonable orders or directions of the [Manager] Director of Parks and Recreation or [the Manager of Parks and Recreation's] designee.

~~{(17)}~~ (16) No person shall break, cut, mutilate, injure, remove or carry away any tree, plant, flower, shrub, rock, soil, sand, fence, bench or any other property in any park.

~~{(18)}~~ (17) No person shall ride a horse or other animal in any park except on designated trails or paths or allow any animal to go unattended or without physical restraint. This provision shall not apply to the use or riding of horses for law-enforcement purposes.

~~{(19)}~~ (18) No person shall use scuba or other diving equipment in any park without a permit from the city. ~~[Manager of Parks and Recreation.]~~

~~{(20)}~~ (19) Park and recreation programs.

(A) No person involved in any event of the Park and Recreation Department ~~[Division]~~, including, but not limited to, sponsors of teams thereof, shall commit an unfair discriminatory practice or deny another person access to, admission to, or utilization of, or benefit from any such event because of race, color, creed, religion or national origin.

(B) Exception: the provisions of subsection (20)(A) above shall not apply to a religious organization with respect to qualifications based on religion, when religion shall be a bona fide qualification for membership.

~~[(24)]~~ (20) No person shall use a tobacco-related product on city-owned athletic play fields, including their spectator areas, while the fields are being used for organized youth athletic events or organized adult recreational events. These areas shall be posted by ~~[appropriate]~~ signs and markers as directed by the ~~[Manager]~~ Director of Parks and Recreation.

~~[(22)]~~ (21) No person shall use a tobacco-related product on city-owned property during city sponsored cultural programs. ~~[such as Arts in the Park, Summer Fete and River Rendezvous.]~~ The ~~[Manager]~~ Director of Parks and Recreation may permit the use of tobacco-related products for special events such as historical programs and theatrical productions if such use is an integral part of the event. These areas shall be posted by ~~[appropriate]~~ signs and markers as directed by the Director of Parks and Recreation.

~~[(23)]~~ (22) City-owned parks, open spaces and recreation areas.

(A) No person shall use a tobacco-related product on city-owned golf courses and on the exterior premises of the Bloomington Ice Garden. These areas shall be posted by ~~[appropriate]~~ signs and markers as directed by the ~~[Manager]~~ Director of Parks and Recreation.

(B) No person shall use a tobacco-related product on city-owned parks, conservation areas and open spaces, including trails used for walking and biking or on property for which the city retains a perpetual easement for public use as a park. These areas shall be posted by ~~[appropriate]~~ signs and markers as directed by the ~~[Manager]~~ Director of Parks and Recreation.

(C) No person shall use a tobacco-related product at city-owned picnic shelters during private rentals of these facilities. These areas shall be posted by appropriate signs and markers as directed by the ~~[Manager]~~ Director of Parks and Recreation.

(D) This section does not apply to the use of a tobacco-related product in a motor vehicle parked on the premises of a city-owned park, conservation area, open space and recreational facility.

(23) No person shall use sound amplifying equipment without obtaining a permit from the city.

(24) No person shall intentionally take a photograph or otherwise record a child without the consent of the child's parent or guardian.

(25) No person shall use an aircraft of any kind, whether motorized or non-motorized without first obtaining a permit from the city.

(26) Rental permits are required for the exclusive use of all or portions of specific areas, building and other facilities for conducting special events.

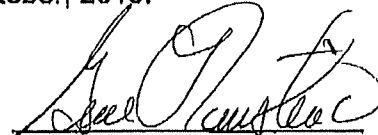
§ 5.22 PENALTY.

Any person violating § 5.21(9) or ~~[(44)]~~ (13) shall be guilty of a misdemeanor, all other violations of this Article III shall be punishable as a petty misdemeanor.

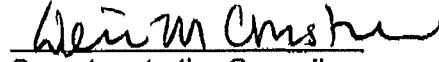
§ 5.22.01 SEVERABILITY.

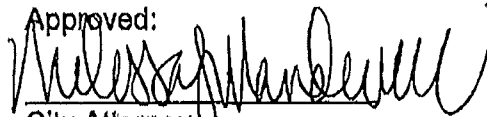
If any section, subsection, sentence, clause or phrase of this Article III is for any reason held to be invalid, such decision shall not affect the validity of the remaining portion of the Article III. The City Council hereby declares that it would have adopted this Article III and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

Passed and adopted this 28th day of October, 2019.


Mayor

ATTEST:


Secretary to the Council

Approved:

City Attorney